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No. 83-671

In the Supreme Court of the United States

OCTOBER TERM, 1983

ISAAC KATTAN-KASSIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by a jury viewing of the crime scene, conducted at petitioner's request, at which neither petitioner, the judge, counsel, nor the court reporter was present.

2. Whether the imposition of consecutive sentences for possession of cocaine with intent to distribute it and for conspiracy to commit that offense violate the Double Jeopardy Clause.

3. Whether the pre-sentence memorandum filed by the government deprived petitioner of a fair sentencing hearing.

4. Whether the court of appeals relied upon facts adduced at the separate trial of petitioner's co-defendant in rejecting petitioner's claim that the evidence at his own trial was insufficient.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1983. A petition for rehearing was denied on August 24, 1983 (Pet. App. B1-B3). The petition for a writ of certiorari was filed on October 21, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of 20 kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a) and 18 U.S.C. 2, and of conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of 15

years' imprisonment, a fine of $15,000 on each count, and three years' special parole.[1] The court of appeals affirmed (Pet. App. A1-A11).

1. The evidence at trial showed that on February 26, 1981, petitioner, while under surveillance by agents of the Drug Enforcement Administration (DEA), met with co-defendant Hector Espinosa-Orlando[2] at a condominium complex located at 1915 Brickell Avenue in Miami, Florida (Tr. 27).[3] When petitioner and Espinosa left the building, they talked for several minutes in the middle of the parking lot (Tr. 28). Petitioner then entered his vehicle and drove north on Brickell Avenue (Tr. 31). Petitioner made a U-turn, placed a call from a pay phone, and proceeded south on Brickell (Tr. 145, 146, 218). Petitioner then made another U-turn and travelled north to approximately the 800-1000 block of Brickell, made a second call from a pay phone, and returned to the 1915 Brickell complex (Tr. 32, 146, 218). Petitioner slowed his vehicle almost to a stop and

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[1]Petitioner pleaded guilty to money laundering charges in another case and was sentenced to a five-year term of imprisonment concurrent with his sentence in the instant case (Pet. App. A2 n.2). See *United States* v. *Kattan-Kassin*, 696 F.2d 893 (11th Cir. 1983).

[2]Petitioner and Espinosa had been the objects of DEA surveillance commencing in January 1981 because it was believed they were laundering narcotics proceeds. Both were arrested and indicted for the offenses involved in this case. On the date set for their joint trial Espinosa jumped bail, and petitioner was tried alone. Subsequently, Espinosa was apprehended and convicted on narcotics and bail jumping charges (18 U.S.C. 3150). Espinosa was sentenced to 13 years' imprisonment and a $5,000 fine (Pet. App. A2). See *United States* v. *Espinosa-Orlando*, 704 F.2d 507, 508-509 (11th Cir. 1983).

[3]Petitioner had been at the 1915 Brickell condominium at least once before, on February 5, 1981, when he gave the alias "Julio" to the security guard and asked to be admitted to apartment 1113 (Tr. 275). A passkey to apartment 1113 was found on Espinosa when he was searched after his arrest in this case (Tr. 273).

pulled in front of Espinosa, who was parked alongside the access road to 1901 Brickell in a white Jaguar (Tr. 32). Petitioner then led Espinosa to the 300-400 block of Biscayne Boulevard where 20 kilograms of cocaine were to be transferred to Espinosa (Tr. 33-43, 148-152, 221-222).[4]

Petitioner parked his car on Biscayne Boulevard in front of a hotel while Espinosa parked inside a parking island on Biscayne (Tr. 34, 148-149, 221). Espinosa walked over to petitioner and talked with him for about five minutes (Tr. 148-149, 221). Both Espinosa and petitioner looked north and south on Biscayne while they talked (Tr. 149). Espinosa then crossed Biscayne and returned to his car (Tr. 150, 221). At that time, a white Citation pulled inside the parking island (Tr. 150). Petitioner crossed Biscayne and stood near the Citation (Tr. 150, 221). Espinosa drove his vehicle close to the place where petitioner was standing (Tr. 150-151, 221). After petitioner spoke briefly to the driver of the Citation, a suitcase containing 20 kilograms of cocaine was transferred from the Citation to the trunk of Espinosa's Jaguar (Tr. 42, 151, 222). During this time, petitioner turned to look around several times (Tr. 222). After the transfer, Espinosa shook hands with petitioner and waved to him while driving away (Tr. 43, 152, 222).

DEA agents stopped Espinosa's Jaguar and recovered the suitcase containing the 20 kilograms of cocaine (Tr. 225). When petitioner was stopped and arrested shortly thereafter, he had Espinosa's unpublished phone number in his possession (Tr. 265-266, 271-272).

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[4]In driving to the scene of the exchange, petitioner led the way; Espinosa followed and changed lanes whenever petitioner did so (Tr. 33, 148). For example, when petitioner made an illegal left turn against traffic, turning west off of Biscayne Boulevard onto Northeast 4th Street, Espinosa did the same (Tr. 33-34).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 7-22) that he was denied a fair trial because the jury viewed the crime scene outside his presence and outside the presence of the trial judge, counsel, and a court reporter. The pertinent facts were described by the court of appeals as follows (Pet. App. A2-A3).

> During the trial, defense counsel requested a jury viewing of the crime scene. The procedure utilized was suggested by the defense. The defense urged that a jury view was critical to its case. Pursuant to [petitioner's] request, the judge delineated the logistics to be employed — only the jurors and federal marshals were to attend the view. The court then gave a cautionary instruction to the jury. Both parties agreed to the procedure. Defense counsel made no objection. The jury view consisted of a silent inspection where no questions were asked and no statements were made.

At the outset, as the court of appeals held (Pet. App. A5), petitioner waived his right to object to the jury view since he had requested the view, suggested the procedure to be used, and agreed to the format that was adopted.[5] See *Valdez* v. *United States*, 244 U.S. 432, 445 (1917) (defendant waived his right to be present at a jury viewing by failing to request that he be allowed to attend). Accordingly, there is no occasion to review further petitioner's claim of error. In any event, the view conducted in this case did not deny petitioner a fair trial.

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[5]As petitioner notes (Pet. 15-16 n.8), during a colloquy with the trial court regarding the procedure to be followed during the jury view, defense counsel stated that he did not "see any problem" with counsel's being there to "watch" the jurors and "to see what they see." Counsel did not, however, affirmatively espouse that position, but instead agreed that the view be conducted outside counsel's presence (Pet. App. A3; Tr. 192, 194, 202-203).

This Court has said that "the presence of a defendant [at a jury viewing] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder* v. *Massachusetts*, 291 U.S. 97, 107-108 (1934). See also *Faretta* v. *California*, 422 U.S. 806, 816 (1975) (right of accused "to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence"). *Snyder* explained that the defendant has a right to be present at the jury viewing only if "his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. * * * [The Due Process Clause does not] assure[] the privilege of presence when presence would be useless, or the benefit but a shadow" (291 U.S. at 105-107). And where, as in the instant case, there is "a bare inspection and nothing more, a view where nothing is said by any one to direct the attention of the jury to one feature or another," due process "does not assure to a defendant the privilege to be present" (291 U.S. at 108). In light of the limited jury viewing that was conducted in this case — a " 'bare inspection' " that "transpired in silence" (Pet. App. A4) — the court of appeals correctly concluded that petitioner's rights were not violated by his absence from the scene.

Nor, even apart from waiver, were petitioner's rights violated by the absence of the trial judge, counsel, or the court reporter at the jury viewing. As this Court noted in *Snyder*, 291 U.S. at 113-114, "the judge is not required to be present at a view, though he may go there if he will." With respect to counsel, in light of the manner in which the jury viewing was conducted, there is no reason to conclude —and petitioner makes no showing — that counsel's absence impaired a "meaningful 'defence' " (*United States* v. *Wade*, 388 U.S. 218, 225 (1967)); indeed, counsel was undoubtedly familiar with the site, and most of the cross-examination of the government's witnesses had occurred

before the viewing took place. Petitioner's claim (Pet. 20) that the absence of counsel and a court reporter at the jury viewing denied him the opportunity "to know what transpired" is insubstantial. As the court of appeals noted (Pet. App. A3), "[t]he jury view consisted of a silent inspection where no questions were asked and no statements were made," and petitioner does not assert anything to the contrary. "If [petitioner had] felt any doubt about [the conduct of the view], he could [have] examine[d] the bailiffs at the trial." *Snyder*, 291 U.S. at 108.

Finally, as the court of appeals held (Pet. App. A6), there is no reason to conclude that petitioner suffered prejudice as a result of the jury view, and any error in the conduct of the viewing would be harmless. See *Estes* v. *United States*, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965).[6]

2. Petitioner contends (Pet. 31-32) that the Double Jeopardy Clause bars the imposition of consecutive sentences on the conspiracy count under 21 U.S.C. 846 and on the substantive count of possession with intent to distribute under 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. His argument that he received multiple punishments for the same offense rests on the assertion that "the same evidence" was used to convict him on both counts. Petitioner's contention is clearly meritless.

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[6]The court of appeals also properly rejected (Pet. App. A5-A6) petitioner's argument that Fed. R. Crim. P. 43(a), which requires the defendant's presence "at every stage of the trial," was violated by the jury view in the instant case. As this Court noted in *Synder*, 291 U.S. at 113, "a [jury] view is not a 'trial' nor any part of a trial * * *." In any event, under Fed. R. Crim. P. 43(b), a defendant may voluntarily absent himself from a part of the trial; in this case, petitioner forfeited whatever right he might have had by not requesting to be present at the viewing and, in fact, agreeing to the procedure followed. Finally, because there was no prejudice, any error was harmless.

As this Court stated in *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981) (citations and footnote omitted):

> "[W]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

See also *Missouri* v. *Hunter*, No. 81-1214 (Jan. 19, 1983).

The substantive and conspiracy statutes under which petitioner was convicted (21 U.S.C. 841 and 846) plainly satisfy the test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), since each "requires proof of a fact which the other does not." See *United States* v. *DeVincent*, 632 F.2d 155, 159-160 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981) (aiding and abetting a substantive offense and conspiracy to commit that offense are distinct crimes under the *Blockburger* test); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980) (same); *United States* v. *Kearney*, 560 F.2d 1358, 1365-1367 (9th Cir.), cert. denied, 434 U.S. 971 (1977) (same); see generally *Pinkerton* v. *United States*, 328 U.S. 640, 642-643 (1946).[7] Moreover, the two provisions were enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and there is

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[7]Petitioner's suggestion (Pet. 31) that this Court's decisions in *Whalen* v. *United States*, 445 U.S. 684 (1980), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980), require a "re-examination" of the *Blockburger* test is baseless since the Court recently reaffirmed that test in *Albernaz*, 450 U.S. at 337-338, 344-345 n.3.

"nothing in either the Act or the legislative history which would indicate that Congress intended to depart from the general rule that courts can impose separate sentences for the conspiracy to commit an offense and the accomplishment of the substantive offense itself." *United States* v. *Wylie*, 625 F.2d 1371, 1381 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981). In fact, "[t]he structure and legislative history of the drug abuse act provide persuasive evidence that, because of the special dangers which conspiracies to distribute controlled drugs pose to society, Congress did intend that a conspiracy to violate the Act should constitute a separate crime in addition to the substantive offense." *Wylie*, 625 F.2d at 1382 (quoting *United States* v. *Bommarito*, 524 F.2d 140, 143-144 (2d Cir. 1975)). See also *Albernaz*, 450 U.S. at 343; *United States* v. *McDonald*, 692 F.2d 376, 380 (5th Cir. 1982), cert. denied, No. 82-6279 (Apr. 4, 1983) ("one stated goal of the 1970 Act was to bring the full power of the federal government to bear on the illegal traffic in drugs").[8]

Contrary to petitioner's contention, no different result is required by the fact that the same evidence was used to prove the substantive and conspiracy drug offenses. As this Court has made clear, the governing standard "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Albernaz*, 450 U.S. at 338 (quoting *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17

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[8]The fact that petitioner's substantive conviction rested upon an aiding and abetting theory (18 U.S.C. 2) does not lead to a different conclusion, as he claims (Pet. 31). The aiding and abetting statute does not state a new offense, but merely provides that an accomplice to an offense "is punishable as a principal." Thus, petitioner is in no different position than if he had personally rather than vicariously committed the substantive offense.

(1975)). And petitioner has pointed to no reason to believe that Congress did not "intend to allow the courts to impose consecutive sentences for consipracy (21 U.S.C. § 846), and for substantive offenses (21 U.S.C. § 841(a)(1)), even when the proof necessary to obtain a conviction for the former was necessary to obtain a conviction for the latter offense." *Wylie*, 625 F.2d at 1382 (footnote omitted). Accordingly, the court below correctly held (Pet. App. A8) that the imposition of consecutive sentences in this case did not violate the Double Jeopardy Clause. See *United States* v. *Wylie, supra*; *United States* v. *Pearson*, 655 F.2d 569, 570 (1981), aff'd on rehearing, 667 F.2d 12, 15 (5th Cir. 1982).[9]

3. Petitioner contends (Pet. 28-30) that his rights under the Due Process Clause and Fed. R. Crim. P. 32 were violated by the government's filing of a pre-sentence memorandum. This contention is without merit.

The pertinent facts, as set forth in the opinion below (Pet. App. A8-A9 & n.5), show that prior to petitioner's sentencing, the government filed a pre-sentence memorandum that contained "hearsay material and matters involved in [petitioner's] upcoming trial on laundering charges." The district court granted petitioner's motion to strike the portions of the memorandum dealing with the laundering allegations, but it denied his request for a new pre-sentence

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[9]There is no merit to petitioner's contention (Pet. 31) that the decision below conflicts with *Pandelli* v. *United States*, 635 F.2d 533 (6th Cir. 1980), and *United States* v. *Austin*, 529 F.2d 559 (6th Cir. 1976). Those cases — which antedated *Albernaz* and *Hunter* — did not involve the Drug Control Act, and the offenses for which multiple punishments were imposed were found to charge essentially the same crime and not to reflect a congressional purpose to authorize multiple punishment. In the instant case, by contrast, the statutes under which petitioner received consecutive sentences meet the *Blockburger* test for separate offenses, and the evidence of congressional intent in the Drug Abuse Act does not cast doubt upon the propriety of consecutive sentences.

investigation and for sentencing before another judge. A sentencing hearing was held at which both parties were permitted to call and cross-examine witnesses; in addition, petitioner was allowed to give an unsworn statement that was not subject to cross-examination (*id.* at A9). Finally, at the time of petitioner's sentencing, the district judge stated that he had not considered the government's memorandum (*id.* at A9, A10-A11).

It is a " 'fundamental sentencing principle' that 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' " *Roberts* v. *United States*, 445 U.S. 552, 556 (1980) (quoting *United States* v. *Grayson*, 438 U.S. 41, 50 (1978), and *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)). See also 18 U.S.C. 3577; 21 U.S.C. 850. "At a sentencing, a Court can consider many matters that might not be admissable at a trial * * *" (*United States* v. *Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977)), and the sentencing court's broad discretion will not be disturbed "absent gross abuse." *United States* v. *Gonzalez*, 661 F.2d 488, 495 (5th Cir. 1981).

Under these principles, the court of appeals correctly rejected (Pet. App. A10-A11) petitioner's claim. Since petitioner was given a full sentencing hearing and had ample opportunity to rebut the materials submitted by the government, there was "no abuse of discretion by the trial court in the sentencing of [petitioner] and no violation of [his] rights" (*id.* at A10). And in any event, the record makes clear, as the court of appeals pointed out, that the district court did not consider the challenged pre-sentence report in imposing sentence on petitioner (*id.* at A9, A10-A11).

4. Finally, petitioner argues (Pet. 22-27) that the court below improperly "adopted" the evidence presented at co-defendant Espinosa's separate trial in rejecting petitioner's

claim on appeal that the evidence at his trial was insufficient to support his conviction. This argument is predicated on the fact that, at the outset of its opinion in this case, the court of appeals noted that "[t]he facts surrounding [petitioner's] arrest are set out in [the opinion affirming Espinosa's conviction]" (Pet. App. A2).

The introductory reference to the background description in the *Espinosa* opinion plainly does not suggest that the court of appeals judged the sufficiency of the evidence presented at petitioner's trial on the basis of the record in *Espinosa*. On the contrary, the facts recounted by the court below in rejecting petitioner's insufficiency argument (Pet. App. A6-A7) had been established by evidence adduced at petitioner's own trial. See, *e.g.*, Tr. 28, 31-43, 145-152, 218-225; see also pages 2-3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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